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United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Woo Wai, Wong Chung and Wong Yee, *Plaintiffs in Error,* *vs.* The United States of America, *Defendant in Error.*	No. 2507.

BRIEF OF DEFENDANT IN ERROR.

ALBERT SCHOONOVER,
United States Attorney.
HARRY R. ARCHBALD,
Assistant U. S. Attorney.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

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IN RE "THE STORY."

If there had been anything at all in the facts adduced on the trial of the present case, to in any way justify the astonishing "story" which burdens the first pages of the brief for plaintiffs in error, and after such matters had been argued to the jury with the eloquence and force that a justly indignant counsel would have in such a case, the most optimistic prosecutor would, and rightly should, expect at the hands of a jury of twelve men exercising the supreme discretion vested in them, nothing but a verdict of "not guilty." But even if the jury in such a case, mindful of the

charge given by the judge, should have returned a verdict of "guilty," we would rightly expect to find accompanying such verdict, the strongest recommendations of mercy and some expression of the disgust the jury would necessarily have for officers capable of devising such "a nefarious scheme" and of putting it into execution. But even if the jury should fail to be touched by such a state of facts (which is impossible to conceive), no just judge could fail to be impressed, and would exercise the discretion vested in him by the imposition of the very minimum penalty and then of remitting that. But that alone would not meet the requirements of justice in such a case as that portrayed in such "story." Any officials who could so far forget the principles that one would expect to find present in a high degree in men of the standing and character of the gentleman attacked therein, would and should receive the severest verbal castigation in open court from the judge on the bench. Imagine the astonishment of any one, then, on searching the record of the case, to find that the jury returned a verdict of guilty, without a sign of a recommendation for leniency, or condemnation of the officers in charge of the gathering of the evidence, and on further finding that the judge before whom the case was tried, who heard all the evidence and saw the witnesses, instead of so exercising the discretion vested in him and imposing the minimum fine, with severe criticism for the conduct of such officers, without any criticism at all of such officers, imposed upon the defendant, who, counsel would have us believe, is an honest and honorable

Chinaman, made a criminal by the "machinations and outrageous traps of government officials," a fine of $5000.00 and eighteen months at McNeil Island [Tr. 21], in a case where the maximum punishment provided is a fine of $10,000.00 and two years' imprisonment.

Further comment upon "The Story" and its continuation and emphasis in counsel's statement of the facts would seem to be unnecessary.

Statement of Facts.

Believing that counsel for plaintiffs in error have relied too much in their statement of facts on the evidence of witnesses who, as Justice Field in the Chinese Exclusion Case (130 U. S. 581, 598) says, entertain "loose notions of the obligation of an oath," and which notions are disclosed in the present case in the testimony given by such witnesses, we desire to controvert such statement of facts, and to briefly state the facts as they would seem to be from an unbiased reading of the record, and as they undoubtedly appeared to the judge and jury before whom they were presented.

In August, 1908, Professor Sanford of Stanford University was put in charge of the investigation of violations of the immigration laws on the Pacific Coast, in which work he continued until March 1, 1909 [Tr. 63].

He had evidence and reports that one Woo Wai was engaged in importing Chinese prostitutes in San Francisco, and wanted to get hold of him so as to make him tell who his confederates were [Tr. 83], believing

them to be parties connected with the Immigration Service [Tr. 78].

To get information of Woo Wai's operations, he employed one G. M. Roy (whose testimony, fortunately for Woo Wai's story, as we believe, is not in the record, for the reason that the great United States with all its power could not find or produce him at the trial, much as it desired to do so) to act in connection with his investigation and to report to him [Tr. 63]. Woo Wai had known Roy for several years [Tr. 137] and was very intimate with him [Tr. 152]. If Woo Wai's testimony is to be believed (which we submit is not the case), Roy immediately proceeded to induce him to meet Weddle and Conklin. The more reasonable assumption is that Woo Wai kept from Roy the facts as to his operations in San Francisco, just as he did from Weddle and Conklin the actual details of the operations of the enterprise they were supposed to be assisting, and that Roy dropped the word that Weddle and Conklin were friends of his, whereupon Woo Wai seized upon an opportunity to extend his operations into new fields. On October 26, 1908, Woo Wai, accompanied by Roy, appeared in San Diego [Tr. 69] and met Inspectors Weddle and Conklin, who were advised beforehand that Roy would be there with someone who would make them an offer to which they should apparently consent [Tr. 77 and 116].

(As to who paid the expenses the record is silent, except for the impossible story of Woo Wai. K. C. Lanier says that he wouldn't be positive as to who paid the hotel bill at San Diego, but that he has it

on his books as having been paid by Roy. That is probably true, as Roy's knowledge of English would make him the spokesman of the party, even if the prominent Chinese merchant furnished the money he paid.)

Roy introduced Conklin and Weddle to Woo Wai as his friends, although neither knew him before [Tr. 78 and 116], whereupon Woo Wai said that if they would allow Chinese to come from Mexico and pass through their district that he would pay Weddle and Conklin $50.00 apiece upon their safe arrival at destination. Acting under their instructions they apparently assented to the proposition [Tr. 70, 78 and 117].

Woo Wai and Roy went back to San Francisco and Woo Wai afterwards came to Conklin's house in San Diego with defendants Wong Chung and Wong Yee [Tr. 79 and 117], Wong Chung being a business partner of Woo Wai [Tr. 143], and Woo Wai's former offer was repeated and apparently accepted [Tr. 79 and 118], at which time Woo Wai said he would send Wong Yee to Ensenada to make arrangements to bring Chinese into the United States [Tr. 120], and Woo Wai suggested Orange as a good shipping point, to which Conklin agreed, as he was familiar with the place and could apprehend the contrabands there easier [Tr. 125, 126 and 69].

Wong Yee went to Ensenada and reported to Conklin that he had secured an agent there to handle the business, and that a party would soon be on the road [Tr. 120].

Weddle never met Roy but the one time [Tr. 75]. Conklin saw Roy twice, the last time being in the latter part of November, 1908, and never corresponded with him [Tr. 123], and Roy had nothing to do with the business, so far as Weddle knew, after 1908 [Tr. 81].

Nothing came of these proposals, so far as the record shows, and Conklin and Weddle were not making any investigations for Professor Sanford after December, 1908 [Tr. 79], and all the government officials interested considered the incident closed [Tr. 88, 89 and 126], as Professor Sanford had written Woo Wai that his visits to San Diego were known and that if he continued to try to smuggle Chinese into the United States it would result in arrest and probable conviction [Tr. 89]. Conklin and Weddle did not see Woo Wai or have any communication with him after November 16, 1908, until the latter part of March or the first of April, 1910, except the receipt from him of some presents about Christmas, 1908 [Tr. 79 and 123].

The 1st or 2nd of April, 1910, Conklin received a letter [U. S. Exhibit 5, Tr. 65] from Woo Wai [Tr. 96] saying that Woo Wai and Wong Yee would be in San Diego and wanted Conklin to be home Saturday night, April 3, and have Weddle there. Conklin and Weddle kept the appointment made by letter and met Woo Wai, Wong Yee and Wong Chung [Tr. 65 and 96].

The letter of March 31, 1910, was the first letter Conklin received from Woo Wai [Tr. 115], and it

came to Conklin without any instigation whatsoever [Tr. 123].

Woo Wai said they could no longer do business in San Francisco and so came down to see Conklin and Weddle [Tr. 65, 80 and 97], and made the same proposition to them that he had made on two former occasions [Tr. 65 and 97]. This visit was a surprise and Conklin and Weddle wanted time to report the matter to their superiors [Tr. 97], which was done by Weddle, and he was instructed to obtain further evidence against Woo Wai to make a conviction [Tr. 87 and 88].

Conklin received a letter [Tr. 70] from Woo Wai advising him that six men were coming and to care for them [Tr. 97]. Efforts were made without avail to apprehend these contrabands [Tr. 71 and 73]. They were afterwards informed by Woo Wai, in letter [Tr. 71] and conversation with them at San Diego, of the safe arrival of the six Chinese at San Francisco, and were paid $250.00 for the six so entering successfully [Tr. 72 and 98].

Not hearing anything more for some time, it was determined to send Conklin to San Francisco to ascertain if they were still bringing Chinese through [Tr. 100].

Conklin met Woo Wai November 27, 1910, who said as soon as he saw Conklin, "My God! Now you no get my letter!" and who told Conklin that he had sent him two letters—the 23rd and 24th—advising that there were seven or eight men coming from Ensenada [Tr. 100, 102, 103].

Conklin advised Weddle, and efforts were made to apprehend the contrabands [Tr. 94, 95 and 104]. Various letters were written and telegrams sent by Conklin to Woo Wai to draw out definite information as to the whereabouts of the eight contrabands [Tr. 84, 86 and 87] and some information was developed [Tr. 108, 109, 111], the definite information that led to the arrest of the contrabands and defendant Wong Chung and Wong Wing Sai coming in a letter from Woo Wai dated Jan. 9, 1911 [Tr. 112], and through such contrabands the chain of evidence was developed connecting the activities of the defendants with an actual and provable importation of contrabands, in which some of the contrabands themselves, and one of the guides, were living exhibits and witnesses. (See testimony of Pedro Valenzuela [Tr. 30], Quan Bo [Tr. 55], Wong Ging Wee [Tr. 57], Wong Dom Him [Tr. 59], Wong Sun [Tr. 61] and Wong Ging Foon [Tr. 62]).

Points and Authorities.

The only errors specified in the brief of plaintiffs in error are in the refusal of the trial judge to give certain requested instructions and in his having given certain other instructions. (Plaintiff's Brief 13.)

While we believe this record fails absolutely to support the contention of plaintiff in error as to what took place, and that the efforts and actions of all officials engaged were entirely in the line of their respective duties and highly commendable, still, in view of the fact that the instructions given and refused

involve even the facts of an extreme case and one in which the action of the officials would have been as reprehensible as they were commendable in this case, we want Your Honor to understand our position thoroughly before we proceed further. For officials violating their duties toward the government, as counsel would have you believe the officials in this case did, we would of necessity have feelings of the deepest disgust and would join with counsel in excoriating them and condemning such actions. We could not, however, join counsel in asking that a greater public wrong be done simply because of the acts of such officials. There is an ample remedy in the hands of the courts to meet such a situation when it confronts them, sustained by principle, and which violates no other principle of public policy, and does not, as the remedy counsel asks you to put into effect, leave a great door open for the miscarriage of justice in many cases at the hands of a jury made oversympathetic, or unjustly indignant by an eloquent counsel.

The substance and effect of the instructions requested by defendants below, and upon the refusal to give which error is specified, is that notwithstanding the fact that defendants violated a criminal law of the United States, if the defendants were advised, instigated, suggested, induced or procured to commit such crime, by government officers, agents, or persons acting under the employment of such officers, the jury should find such defendants not guilty. Such instructions would seem to amount to a demand that the jurymen violate their oaths.

> "Whoever 'aids, abets, counsels, commands, induces or procures' the commission of any act constituting an offense defined in any law of the United States 'is a principal.'"
>
> Sec. 332, Act March 4, 1909, ch. 321.

The language above does not exclude government officers and agents and persons employed by them, but includes them, and in the extreme case pictured by counsel a very proper instruction would have been that such officers, agents and persons were themselves guilty of the offense. The guilt or innocence of the officers, however, should not cause others guilty of the same offense to be declared not guilty.

It is safe to say that every crime committed by two or more persons is suggested, instigated or induced by some one or more of such persons, and yet no one would be foolish enough to suggest that as a defense. The judge would, no doubt, take into consideration the situation of the parties and the manner and cause of their participation, in determining the sentences to be imposed, and that is all that could justly be asked. Why should a different rule prevail where the suggestion, instigation or inducement came from a government officer, employee, agent, or person acting under their employment?

No officer or agent of the government has the right or power to authorize the commission of an offense against the laws of the United States, nor to procure another to violate its laws, nor to protect anyone found violating the laws from arrest. No argument is necessary to support the foregoing propositions, and some

such authority would be absolutely necessary to support the requested instructions on principle. In view of which we submit that the instruction given by the trial judge, to the effect that it is no defense to the guilty that government officers or agents instigated the crime, is sound.

The defendants ask the court to sustain a principle of public policy in a manner which strikes down several such principles that are equally as great, if not greater than the one for which they contend. We desire to impress upon the court that we stand for the enforcement of the same principles of public policy that plaintiffs in error demand enforced, but we also insist upon the maintenance of the great principle that the government of the United States is not barred, bound or estopped by the acts of its officers and agents, and that no acknowledged offender against its laws shall be declared "not guilty."

In citing and discussing the authorities on this question we should distinguish at the outset the instant case, involving as it does a conspiracy to violate a law designed to facilitate the performance of a governmental and public duty, to-wit, the exclusion of Chinese laborers, from a law designed for the protection of private property and interests. Many of the cases cited in the brief of plaintiff in error are of the latter class, involving charges of larceny and burglary, where want of consent of the owner of the thing stolen or house entered is an essential element of the crime. Necessarily, where such owner procures another to carry away his property or to enter his house, the act

is not against the consent of the owner, but with it, and hence no crime is committed. The principle is well stated in the following quotations:

> "We know of no case that holds that one who has committed a criminal act should be acquitted because induced to do so by another. It is merely when the criminality of the act is shown to be absent by the fact of the inducement that such proof justifies acquittal. In cases of alleged larceny, where the master has directed a servant to deliver his property to a thief, or burglary, where he has directed the admission of the burglar, the principal element of the offense is lacking; in the former there is no felonious taking, in the latter no felonious breaking and entering."
>
> People v. Liphart, 105 Mich. 80, 83, 84.

> "While generally private persons cannot license crimes, and it is no palliation or excuse that a wrongdoer had anybody's permission, there are exceptions to this general rule, because there are certain acts which the law makes criminal when and because done without consent, the doing of which with consent is not legally reprehensible."
>
> State v. Waghalter, 177 Mo. 676, 686.

The following cases cited and quoted from in the brief for plaintiffs in error involve either the offense of larceny or burglary:

People v. Hanselman, 76 Cal. 460;

Connor v. People, 18 Colo. 373, 25 L. R. A. 341;

Love v. People, 160 Ill. 501, 32 L. R. A. 139;

State v. Currie, 13 N. D. 655, 69 L. R. A. 405;

People v. McCord, 76 Mich. 200, 42 N. W.

The following cases cited in such brief involve the sale of liquor contrary to municipal ordinances:

People v. Braisted, 13 Colo. App. 532, 58 Pac. 796;

Wilcox v. People, 17 Colo. App. 109, 67 Pac. 343;

Scott v. State (Tex. Cr. App.), 153 S. W. 871;

Bush v. State (Tex. Cr. App.), 151 S. W. 556;

Hearne v. State (Tex. Cr. App), 165 S. W. 603.

(This latter case does not involve question as a defense.)

We submit that the following cases lay down the true rule governing such cases, as well as the instant case:

> "We cannot agree with the reasoning of the Colorado court. It would be applicable to the commission of that class of crimes in which the want of consent of the owner of property to its taking or destruction was a necessary element of the offense. In such cases the owner of the property taken or destroyed might, by his conduct in employing a detective to entrap a person suspected of crime, destroy the element of want of consent to such taking or destruction of his property, and hence no crime would be committed by such taking or destruction. But can a man consent to an assault upon himself, and thereby free the perpetrator of such an assault from legal responsibility? Can an officer consent to the commission of a crime and by so doing free the act of its criminal character? A private individual may be estopped in matters relating to his property by his own conduct. Is anyone else estopped by his conduct unless such other person is privy thereto? Has a public officer such property rights in his

office and in the enforcement of the law as by his conduct or consent to be able to estop the state in a prosecution of crime? If so, whose liberty, property, character, or life would be safe? There can be but one answer to these questions, and that is emphatically 'No.' The statement of these propositions amounts to their demonstration, and we deem it unnecessary to make any further argument or to cite authorities in support of our position, at least not until some reason is shown for a contrary view."

DeGraff v. State, 2 Okla. Cr. 519, 103 Pac. 538, 550. (On motion to strike out testimony of detective inducing sale intoxicating liquors contrary to law.)

* * * "The law alleged to have been violated was enacted for the benefit and protection of all the people, for the promotion and preservation of their health, sobriety, thrift, peace, and safety. It was not enacted in the special interest of the prosecuting officers, and a violation thereof is an offense, not against the prosecuting attorney, but against the state. Prosecutions for offenses of this character are in the interest of the public solely, and the prosecuting officer can neither repeal the law, pardon the offender, nor grant indulgences; nor can he lawfully give immunity except in those instances provided for by law. It is no less an offense to sell intoxicating liquor for any purpose to a sheriff or prosecuting attorney or to an agent or representative of either, than it is to sell to any one else; and a sale made to such officer or his agent, though solicited by him for the purpose of detecting the commission of the offense and of instituting a prosecution therefor, is punishable, and the officer's solicitation works no estoppel to a prosecution. The pith of the matter was well stated by Justice Vann in People v. Mills, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A.

131, when he said: 'We are asked to protect the defendant, not because he is innocent, but because a zealous public officer exceeded his powers and held out a bait. The courts do not look to see who held out the bait, but to see who took it.'

"We are aware that there are some decisions which apparently uphold the doctrine contended for by plaintiff in error; but the overwhelming weight of authority, and in our opinion all the reasoning, is on the other side, especially in that class of cases where the offense is one of a kind habitually committed, and the solicitation merely furnished evidence of a course of conduct. See Onondaga County Com'rs v. Backus, 29 How. Prac. (N. Y.) 33; Tripp v. Flanigan, 10 R. I. 128; People v. Murphy, 93 Mich. 41, 52 N. W. 1042; People v. Liphardt, 105 Mich. 80, 62 N. W. 1022; People v. Everts, 112 Mich. 194, 70 N. W. 430; People v. Rush, 113 Mich. 539, 71 N. W. 863; City of Evanston v. Myers, 172 Ill. 266, 50 N. E. 204; State v. Jansen, 22 Kan. 498; State v. Sticknev, 53 Kan. 308, 36 Pac. 714, 42 Am. St. Rep. 284; People v. Mills, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131; United States v. Whittier, 5 Dill. 35, Fed. Cas. No. 16 688; Bates v. United States (C. C.), 10 Fed. 92, and note: United States v. Moore (D. C.), 19 Fed. 39; United States v. Dorsey (D. C.), 40 Fed. 752; Shepard v. United States, 160 Fed. 584, 87 C. C. A. 486; Grimm v. United States, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550; Goode v. United States, 159 U. S. 663, 16 Sup. Ct. 136, 40 L. Ed. 297; Andrews v. United States, 162 U. S. 420, 16 Sup. Ct. 798, 40 L. Ed. 1023; Price v. United States, 165 U. S. 311, 17 Sup. Ct. 366, 41 L. Ed. 727. In many instances habitual and flagrant violations of the liquor laws can be detected by no other means. The officer or his agent may furnish the defendant in such cases the opportunity to sell, but he does not furnish the defendant the liquor or the intent to sell; and the sale to an officer is not more meri-

torious or less criminal than if made to some other person. We find nothing in the law or in public policy forbidding the detection of both the offense and the offender in this manner, and we have no criticism to expend upon a public officer who may find it necessary or expedient to adopt this means of discovering infractions of this law."

Moss v. State, 4 Okla. Cr. 247, 111 Pac. 950, 952.

"In People v. Everts, 112 Mich. 194, and People v. Rush, 113 *id.* 539, it was held no defense in an indictment for an unlawful sale of liquor that it was made to a detective sent by a prosecuting attorney that he might use such purchase and sale as evidence. Indeed, the authorities are numerous, and it would cripple the effective enforcement of the criminal law if it were not permissible to thus procure evidence.

"There are some seeming exceptions, for instance, in larceny, whenever the conduct of the owner amounts to a consent that his property may be taken. The reason is that in larceny it is an indispensable element of the offense that the property shall be taken 'against the will of the owner.' Also, in proceedings for divorce, if the plaintiff secures some one to entice the defendant into illicit acts. The reason is that 'connivance is always a bar to the plaintiff's cause of action.' Dennis v. Dennis, 57 Am. St. 95. But as to prosecution for offenses, not against individuals, but against the public, like the present, it is no defense that the illegal sale was made to a party who bought not for his own use, but to aid in convicting the seller. It is not the motive of the buyer, but the conduct of the seller, which is to be considered."

State v. Smith, 152 N. C. 798, 799, 800.

"The methods adopted by the policeman to catch the defendant in the act of violating the law have been criticised; but it must be remembered that the ways of 'blockaders' are devious and their trade is generally plied 'underground.' However much the defendant, when caught, may criticise the methods used to catch him, it has been held that the transaction is, so far as the defendant is concerned, a violation of law, if the evidence is deemed by the jury sufficient proof of the facts."

State v. Hopkins, 154 N. C. 622, 624.

"It further appears from the evidence that the prosecuting attorney of Butler county was informed of this arrangement and made no objection thereto. Appellant contends that on this showing the court should have *pro bono publico* dismissed the cases.

"Whatever may be said derogatory to the character of those who, as detectives, spies and informers, entrap the law-breaking class by gaining their confidence and practicing deceit upon them, it has never been ruled that they were incompetent witnesses nor that they might not tell the truth, nor is there any recognized public policy that condemns their occupation. On the contrary, the keen and shrewd detective is one of the greatest safeguards to urban life and a terror to the thugs and thieves that infest the cities of the country.

"* * * To discover and bring to justice those who subtly, clandestinely and illegally dispense liquors, the methods resorted to in this case are sometimes indispensable, and when nothing more than the truth is elicited and the guilty are brought to justice through their efforts, a valuable service to the community will have been rendered."

State v. Lucas, 94 Mo. App. 117, 121.

The brief of plaintiff in error also contains a quotation from the case of O'Brien v. State, 6 Tex. App.

665, to the effect that the offer of a bribe on the suggestion of an officer that he will accept it is not punishable. That case has been overruled by the later case of Davis v. State (Tex. Cr. App.), 158 S. W. 288. The court, on page 290 of the opinion, uses the following language:

> "Considerable legal hair-splitting has been indulged in by courts and text writers in discussing this subject. It must be admitted at the outset that it is beyond the power of a private person to license the commission of a crime. As to these more serious crimes which are purely transgressions of the public right, it must follow that consent thereto of private persons directly injured thereby cannot, to any extent, purge such crimes of their character as public wrongs, nor render those who committed them less liable to punishment. The consent of a woman upon whom an abortion was performed constitutes no defense to a prosecution therefor. Commonwealth v. Wood, 77 Mass. (11 Gray) 85; Commonwealth v. Snow, 116 Mass. 47. Similarly, consent of the deceased is no defense to a prosecution for homicide. Regina v. Allison, 8 Car. & P. 418. In a prosecution for bribery, the fact that the prosecuting witness was the giver of the bribe in question cannot excuse defendant. Newman v. People, 23 Colo. 300, 47 Pac. 278. Nor is the latter exculpated by proof that the bribery was instigated for the purpose of entrapping him. People v. Liphardt, 105 Mich. 80, 62 N. W. 1022; State v. Dudoussat, 47 La. Ann. 977, 17 South. 685.
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> "The offer to bribe a public official is a transgression of a public right, and the consent or nonconsent of the officer cannot affect the criminality of the act of the person who makes the offer, and even though Mr. Wilson by his words, acts, and conduct may have been the inducing cause of the offer to bribe, yet, if appellant did, in fact, tender

> money to the officer with the intention and for the purpose of influencing his action as such officer, he would be guilty under our statute. It would not be an offense against Mr. Wilson so much as an offense against the public welfare, and one which no officer would have the authority nor power to give his consent to."

Every decoy letter sent for the purpose of obtaining information declared non-mailable is a direct instigation and inducement of the specific crime upon which the indictment is based, and, in view of the other language in the case, we cannot believe the Supreme Court, in the case of Grimm v. United States, 156 U. S. 604, ever intended by the language quoted in counsel's brief (p. 19) to carry the idea that if it had been the purpose of the postoffice inspector to induce or solicit the commission of a crime, that that would have been a defense. The letters in question in the case were the ones induced and the crime was the result of such inducement, and why the purpose of the inspector should have any consideration in making the act an offense, or in taking away its offensiveness, is beyond conception. The letters were declared non-mailable by statute and were deposited in the mail by defendant, and that is all that is required to violate the act. The defendant in the Grimm case relied upon the cases of United States v. Whittier and United States v. Adams, cited in counsel's brief, and contended as counsel do here, that by reason of the fact that the letters of defendant were deposited in the mails at the instance of the government conviction could not be maintained.

The court, beginning at page 609, uses the following language:

> "It is insisted that the conviction cannot be sustained, because the letters of defendant were deposited in the mails at the instance of the government, and through the solicitation of one of its officers * * *. This objection was properly overruled by the trial court. There has been much discussion as to the relations of detectives to crime, and counsel for defendant relies upon the cases of United States v. Whittier, 5 Dillon 35; United States v. Matthews, 35 Fed. Rep. 890; United States v. Adams, 59 Fed. Rep. 674; Saunders v. People, 38 Mich. 218, in support of the contention that no conviction can be sustained under the facts in this case.
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> "It is unnecessary to review these cases, and it is enough to say that we do not think they warrant the contention of counsel. It does not appear that it was the purpose of the postoffice inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business. The mere facts that the letters were written under an assumed name, and that he was a government official—a detective, he may be called—do not of themselves constitute a defense to the crime actually committed. The official, suspecting that the defendant was engaged in a business offensive to good morals, sought information directly from him, and the defendant, responding thereto, violated a law of the United States by using the mails to convey such information, and he cannot plead in defense that he would not have violated the law if inquiry had not been made of him by such government official. * * *
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> "The law was actually violated by the defendant; he placed letters in the postoffice which conveyed information as to where obscene matter could be obtained, and he placed them there with a view of giving such information to the person

who should actually receive those letters, no matter what his name; and the fact that the person who wrote under these assumed names and received his letters was a government detective in no manner detracts from his guilt."

The jury is not concerned with the good faith of the person who incites, by decoy letter, the sending of non-mailable matter through the mails.

United States v. Moore, 19 Fed. 39, 41.

The fact that a decoy letter is no defense is too well settled by modern authorities to be now open to contention.

Goode v. United States, 159 U. S. 663, 669.

"At the trial it appeared that the letters taken had been mailed for the purpose of detecting the defendant; in other words, were 'decoy' letters; and thereupon the defendant asked the court to instruct the jury that, as the letters taken were mailed for the purpose of entrapping defendant into the commission of a crime, there could be no conviction of the defendant for the taking of said letters.

"The refusal of the court to so charge is the subject of the first assignment of error.

"To dispose of this assignment it is sufficient to cite the case of Goode v. United States, 159 U. S. 663, where it was held that, in an indictment against a letter carrier charged with secreting, embezzling or destroying a letter containing postage stamps, the fact that the letter was a decoy is no defence."

Montgomery v. U. S., 162 U. S. 410.

"As already pointed out, every essential element of a criminal conspiracy was present when they entered into this confederation. Upon what

ground, then, can it be claimed that the fact, that they would not have confederated had it not been for the deception and subterfuges resorted to and the promises made by the detectives, constitutes a defense? Certainly not upon the ground that if the defendants had performed acts to be performed by them they would have been disappointed in their expectation of receiving bribes therefor; nor upon the ground that the commonwealth is estopped by any action of its officers; nor upon the ground that the detectives' consent to acts which were to be performed by the defendants would have deprived their acts, if performed, of any essential element of criminality; nor upon the principle upon which it has been held in some cases to be no burglary where a servant to whom a scheme of burglary has been proposed tells his master or the police, and while apparently confederating with the burglar acts with the knowledge and advice of his master and lets the thieves into the house by opening the door. If there is any ground upon which the facts as to the part the detectives took in the formation of the conspiracy can be held to be a defense, it is upon the ground of public policy, and it is strenuously contended that an acquittal should have been directed for that reason. In general, one who has committed a criminal act is not entitled to be shielded from its consequences merely because he was induced to do so by another. There has been much discussion in the courts of this country and by the text writers as to the relation of detectives to crime, and many of their methods have been severely denounced. A few exceptional cases can be found where upon grounds of public policy the courts have refused to sustain convictions because of the abhorrent methods adopted to lure the accused into crime. Upon the other hand there are many cases wherein the courts, while in some instances condemning the methods employed by the detectives, have sustained the convictions, al-

though the particular crime charged would not have been committed had it not been for the deceptions or subterfuges or the suppression of the truth resorted to by the detective. Without declaring that under no circumstances ought the courts to direct an acquittal of a crime clearly proved upon the ground that the accused was entrapped into it by illegal and immoral detective methods, we are quite clear * * * this case [is] within the second class above mentioned, and that the court did not err in refusing to direct an acquittal upon the ground of public policy."

Com. v. Wasson, 42 Pa. Sup. Ct. Rep. 38, 53.

"Complaint is made by counsel for appellant by reason of the fact that the letters by Leonard, the inspector, to defendant were under the assumed name of a woman, but for which the pamphlet and defendant's letters would not have been mailed. A party who persuades another to commit a crime is an accessory, and as a witness is to be considered as such, and his testimony weighed accordingly. But when officers, or even a private citizen desirous of enforcing the laws, believes from general information, and as in this case, from the pamphlet reciting 'Woman's Doctor,' 'Woman's Friend,' 'Woman's Syringes,' 'Woman's Antiseptic Germ Killing Powders,' 'Consultations only at my offices,' 'Syringes sent by freight only,' then the officer had the legal, as he had the moral, right to send 'decoy letters.' It is now too late to complain of decoy letters in such a case."

Ackley v. U. S., 200 Fed. 217, 222.

"Another contention of the accused is, that the paper alleged to have been mailed was sent in response to a decoy letter, and, for that reason, no crime was committed. It is only necessary to say that that question has been disposed of ad-

versely to the defendant's contention by Grimm v. United States, 156 U. S. 604, 611. In that case it was said: 'The law was actually violated by the defendant; he placed letters in the postoffice which conveyed information as to where obscene matter could be obtained, and he placed them there with a view of giving such information to the person who should actually receive those letters, no matter what his name; and the fact that the person who wrote under those assumed names, and received his letters, was a government detective, in no manner detracts from his guilt.' That doctrine was again announced in Goode v. United States, 159 U. S., 663, 669, in which case it was said that the fact that 'certain prohibited pictures and prints were drawn out of the defendant by a decoy letter written by a government detective, was no defence to an indictment for mailing such prohibited publications.' "

Rosen v. U. S., 161 U. S. 29, 42.

In view of the above decisions the language quoted by counsel from the case of United States v. Jones, 80 Fed. 513, 514, loses all its force as an authority in the present case. The learned judge frankly says farther on in the opinion that he would have followed the rulings of some of the circuit courts discouraging prosecutions based on decoy letters if the Supreme Court had not unmistakably decided that such prosecutions must be sustained.

Where defendant, charged with an attempt to commit abortion, was arrested by officers concealed in an adjoining room after he had placed the patient on an operating table, arranged his instruments, and was about to give the operation, it is no defense that the

arrest was made pursuant to a previous agreement between the patient and the officers.

People v. Conrad, 92 N. Y. Supp. 606.

"The defendants also claim that no judgment should be entered in this case because there is no evidence that they ever made any other shipment of such water in interstate commerce, and the evidence shows that the shipment on which the indictment was based was secretly induced by a government detective in order to create a basis for a criminal charge. There is no evidence that the defendants ever before sold or shipped water outside of New York city. The inspector who ordered the water at Newark had his office in New York. His only apparent object in going to Newark to order this water was to secretly lure the defendants into an act which would enable him to make a criminal charge against them. This was a perfectly wholesome water, and, if there was no other justification for the inspector's proceeding than appears in the evidence, I think his course of action was one of unnecessary zeal. If there were no bottles to be found in other states which had been voluntarily shipped there by the defendants, whatever public evil might result from the sale of such water in New York city might wisely, in my opinion, have been left to be dealt with by the state authorities. The pure food act is a beneficial act; and it will be a matter of regret if the inspectors of the Department of Agriculture arouse hostility to it by excessive zeal to institute trivial prosecutions. But there may have been valid reasons for the course which was taken which did not appear on the trial; and, in any event, I am not willing to hold that because some criticism may perhaps be made on the manner in which the proof was obtained the proof itself was invalid or insufficient."

United States v. Morgan, 181 Fed. 587, 588.

One who has committed a criminal act is not entitled to be shielded from its consequences merely because he was induced to do so by another.

State v. Abley, 109 Ia. 61, 46 L. R. A. 862, 863.

> "His Honor gave no illustration of circumstantial evidence, and finally instructed the jury that there was nothing, legally or morally, wrong for persons to lay a trap, or conspire with others, to detect a culprit; that that has nothing to do with the guilt or innocence of the accused—to all of which we heartily subscribe. The fact that a plan was laid to catch the offender may warrant the jury in scrutinizing the testimony a little more carefully, we do not deny; and there was nothing in the charge to contravene this idea. Indeed, the guilt of the defendant is too manifest to talk about the proof."
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> O'Halloran v. State, 31 Ga. 206, 209.

A case in which it was strenuously urged, as here, that it was the purpose of the government officers to create crime rather than to detect it and for that reason no crime was committed, is that of People v. Mills, 178 N. Y. 274, 67 L. R. A. 131. In that case violation of the property rights of the state was involved, which we submit is of even less importance than a violation of the governmental rights and duties as in the present case, yet the reasoning is particularly applicable here, and we quote freely from pages 135 and 137 of the opinion as reported in the L. R. A.:

> "In view of the able and exhaustive opinion of the appellate division, the only question we feel called upon to consider is that raised by the challenge of the learned counsel for the appellant in

the nature of a demurrer to the evidence. He claims that, even on the assumption that all the evidence for the prosecution is true, still the facts thus proved do not constitute the crime charged in either count of the indictment. His argument is that the object of the district attorney was not to detect, but to create, a crime; and that no crime was committed by the defendant in taking the indictments into his possession, because he took them with the consent of the state as represented by the district attorney. The flaw in this argument is found in the fact that the records were the property of the state, not of the district attorney, and that the latter could not lawfully give them away, or permit them to be taken by the defendant. Purity of intention only could prevent the action of the district attorney from being a crime on his part. This is true also as to the detective, for, if either had in fact intended that the defendant should permanently remove the indictments, and steal, appropriate, or destroy them, he would have come within the statute. Neither of those officers represented the state in placing the records where the defendant could take them, but each was acting as an individual only. Neither had the right or power, as a public officer, to deliver them to the defendant, and, if either had acted with an evil purpose, his act would have been criminal in character."

"We shall not review the authorities cited on either side, for that duty has been so thoroughly discharged by the appellate division that we can throw no further light upon the subject. We merely state that an important distinction between this case and those relied upon by the appellant is found in the difference between public and private ownership of the property taken by the accused. In most cases some third person is injured by the crime, and is directly or indirectly the complainant, but in this case the state was, as it must

be in all criminal cases, the prosecutor, and it was also the injured party, for its property was the subject of the attempt at larceny. If an individual owner voluntarily delivers his property to one who wishes to steal it, there is no trespass; but when the property of the state is delivered by any one, under any circumstances, to any person for the purpose of having him steal it, and he takes it into his possession with intent to steal it, there is a trespass, and the attempt is a crime. The state did not solicit or persuade or tempt the defendant, any more than it took his money when he handed it over to the detective. Neither did the district attorney, as such, but Mr. Jerome did, acting as an individual, with the best of motives, but without the authority of law, and hence his action did not bind the state. While the courts neither adopt nor approve the action of the officers, which they hold was unauthorized, still they should not hesitate to punish the crime actually committed by the defendant. It is their duty to protect the innocent and punish the guilty. We are asked to protect the defendant, not because he is innocent, but because a zealous public officer exceeded his powers, and held out a bait. The court do not look to see who held out a bait, but to see who took it. When it was found that the defendant took into his possession the property of the state with intent to steal it, an offense against public justice was established, and he could not insist as a defense that he would not have committed the crime if he had not been tempted by a public officer whom he thought he had corrupted. He supposed he had bought the assistant district attorney when he handed over the money, but he knew he had not bought the state of New York, and hence that the assistant had no right to give him its property for the purpose of enabling him to steal it."

The above case would seem to be particularly applicable to an extreme case of instigation to commit crime by federal officers charged with the duty to detect and suppress such crime, as well as to the case at bar. Only "purity of intention" would prevent the action of an overzealous official from being itself a crime, but the criminality or lack of criminality on the part of such official should not affect the criminality of anyone else. It is a law of the United States that is violated, not one for the protection of the official himself, nor one in which the consent or non-consent to its commission could possibly be a material and essential element of the offense. Any official overstepping the well recognized limits in such a case does not in any sense represent the government. The government in such a case would not instigate the crime or tempt the defendant, neither would the official, in his official capacity, perform such act. His would be an individual act, although the defendant in such a case would hope that by his supposed connivance with such individual he had stayed the official hand and avoided the consequences of the law he knew he was violating, and, as the court well remarks in the last case cited, while such a defendant might suppose he had bought a public officer of the government, he would know he had not bought the government, and even though he supposed the hand of the official were tied by his complicity, he is bound to know that the hand of the government cannot be so tied.

The principle contended for by counsel would bind the hands of the government absolutely, and, as stated before, open yet another door for an eloquent counsel to reach the jury and play upon the sympathies and feelings of such body, that must result in the miscarriage of justice in many instances.

Under the instruction given, the trial judge has it absolutely in his hands to impose upon any defendant found guilty of a crime which he actually committed, but into which he was drawn by some unscrupulous official, such sentence as meets the ends of justice, and at the same time deal with the offending official from the bench in such a way as to effectually avoid a repetition of the offense, and certainly public policy could require no more than this.

The only consideration such a defendant can justly ask is leniency at the hands of the judge, and the evidence would fully disclose to the judge the degree his discretion in that particular should be exercised, if at all.

The record discloses an objection to any evidence being taken under the indictment on the ground that it fails to state an offense and fails to allege the doing of an overt act in pursuance of the conspiracy [Tr. 27], and is the only challenge of the sufficiency of the indictment shown by the record.

Objections to the sufficiency of an indictment cannot be raised by objecting to the introduction of evidence thereunder.

Numberger v. United States, 156 Fed. 721, 725.

There being no other errors properly assigned, and believing the record fails to disclose any, we submit the judgment should be affirmed.

ALBERT SCHOONOVER,
United States Attorney.
HARRY R. ARCHBALD,
Assistant U. S. Attorney.